OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 9 October 1997 *

1. By the present action, the Commission asks the Court to declare that the Federal Republic of Germany has fallen short of its obligations under the EC Treaty by not adopting within the period prescribed the measures necessary to ensure compliance with the provisions — save Article 10(1), second indent — of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market [1] (hereinafter 'the directive').

Initially, non-compliance with Article 10(1), second indent, was also covered by the Commission's application. However, the German Government contended that the deadline for the Member States to transpose that provision into domestic law had not yet expired at the time when the Commission initiated the pre-litigation procedure. Under Article 23(2) of the directive, that deadline expired one year from the adoption of the 'uniform principles' required by Directive 94/43/EC, [2] that is to say, on 27 July 1995. Moreover, Directive 94/43 was annulled by judgment of the Court of 18 June 1996; [3] accordingly, time had not yet started to run for the purposes of transposing Article 10(1), second indent. The Commission took cognizance of those points and adjusted the application so as to exclude reference to that provision in the form of order sought, while otherwise maintaining its *petitum* unchanged.

2. The directive was designed to further the approximation of the laws of the Member States concerning the authorization of trade in plant protection products, since existing differences 'constitute barriers not only to trade in plant protection products but also to trade in plant products, and thereby directly affect the establishment and operation of the internal market'. [4] The directive, according to Article 1 thereof, 'concerns the authorization, placing on the market, use and control within the Community of plant protection products in commercial form and the placing on the market and control within the Community of active substances intended for a use specified in Article 2(1)'. Article 4 lays down the rules with which Member States must comply in authorizing plant protection products. Article 10(1) lays down the rules derived from the principle of the mutual recognition of authorizations issued in Member

* Original language: Italian.

1 — OJ 1991 L 230, p. 1.

2 — Council Directive 94/43/EC of 27 July 1994 establishing Annex VI to Directive 91/414 on the placing of plant protection products on the market (OJ 1994 L 227, p. 31).

3 — Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943.

4 — See the fifth recital in the preamble.

States: 'tests and analyses already carried out in connection with the authorization of the product' must not be repeated 'to the extent that agricultural, plant health and environmental (including climatic) conditions relevant to the use of the product are comparable in the regions concerned'. [5] Furthermore, the Member States must, 'to the extent that the uniform principles have been adopted in accordance with Article 23, where the product contains only active substances listed in Annex I, also authorize the placing of that product on the market in its territory, to the extent that agricultural, plant health and environmental (including climatic) conditions relevant to the use of the product are comparable in the regions concerned'. [6] Lastly, Article 23 of the directive provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years following notification thereof'. [7]

3. The German Government points out that a draft amendment to the Pflanzenschutzgesetz (Law on Plant Health Protection), designed to bring national legislation into line with the directive, is in the process of being adopted. In substantive terms, it denies failing to fulfil its obligations.

For the reasons set out below, however, I cannot endorse the arguments put forward by the German Government in its defence. First of all, I am not swayed by the argument that there is no need for a special implementing measure in this case since the directive's provisions are essentially the same as those of the German legislation already in force. In that regard, I would merely point out that Article 23(1), second subparagraph, of the directive provides that when Member States adopt implementing measures, 'they shall contain a reference to this directive or shall be accompanied by such reference on the occasion of their official publication'. That provision thus lays down a formal requirement that implementation is to be effected by means of a special implementing measure. In any case, the German Government has failed to provide any details of the content of the national legislation currently in force showing that the directive's transposition is superfluous.

Nor should greater weight be attributed to the contention in the defence that the directive raises a number of difficulties concerning interpretation, which make its immediate transposition into national law more problematic; so much so that the Commission is preparing a guide to interpretation (no further details are given) designed to overcome those difficulties. Suffice it to note that the Commission has firmly denied this. Moreover, I do not understand how such difficulties could amount to extenuating circumstances excusing failure to fulfil the obligation in question: the Member States

5 — See Article 10(1), first indent.

6 — See Article 10(1), second indent.

7 — However, as mentioned above, Article 23(2) makes special arrangements for the adoption of all the measures necessary for applying Article 10(1), second indent.

were required to transpose the directive into national law, regardless of any difficulties of interpretation raised by the relevant provisions.

Lastly, the German Government has argued that, even if the directive in question had been implemented forthwith, the central provision regarding the harmonization of trade in plant protection products — Article 10 — cannot in practice be applied because no active substance has been listed in Annex I. Thus, even if the relevant provisions of the directive had been transposed into national law without delay, the Member States would not in practice be able to proceed with mutual recognition of authorizations.

However, that contention is also unfounded: the Member States' duty to transpose directives into national law does not depend on whether the provisions to be implemented can be applied. The Member States are required to transpose the directive regardless, creating the right conditions under national law to enable the provisions of Community law to be applied. A further question, which does not arise here, is whether or not the conditions for such application already exist. That aspect, however, obviously has no bearing on the obligation to transpose the directive in question into domestic law — an obligation which in the present case has obviously not been fulfilled.

4. I therefore suggest that the Court uphold the action and order the Federal Republic of Germany, pursuant to Article 69(2) of the Rules of Procedure, to pay the costs.